

**IN THE U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

BRYAN J. PESTA)	CASE NO. 1:23-cv-546
)	
<i>Plaintiff,</i>)	
)	JUDGE: DAN AARON POLSTER
v.)	
)	
LAURA BLOOMBERG, et al.)	
)	
<i>Defendants.</i>)	
)	

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF HIS MOTION
FOR SUMMARY JUDGMENT**

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STATEMENT OF ISSUES TO BE DECIDED AND SUMMARY OF THE ARGUMENT

Plaintiff Bryan J. Pesta respectfully moves for summary judgment on his claim of First Amendment retaliation. The undisputed facts and black-letter law show that (1) Dr. Pesta engaged in protected First Amendment conduct in researching and publishing an academic article relating to race and intelligence, (2) an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in the protected conduct, and (3) there is a causal connection between the first two elements.

Dr. Pesta's research and publication on the connection between heredity and observed performance in IQ tests is protected First Amendment activity as a matter of law. As to the second prong, there is no dispute that the Defendants investigated and eventually terminated Pesta. And third, the undisputed evidence set forth in the Memorandum in Support expressly connects Dr. Pesta's research and publication with his termination. The evidence set forth leaves no room for the Defendants to meet their burden of demonstrating that they would have terminated Pesta regardless of his protected speech. Summary judgment in favor of Pesta is therefore appropriate.

INTRODUCTION

On August 30, 2019, Plaintiff Bryan Pesta published a landmark study on the cause of racial differences in intelligence entitled "Global Ancestry and Cognitive Ability" (a/k/a "Lasker, et al., 2019"). *Defendant Ex 3, pp.1-29 and Warne Certification ¶6*. Dr. Pesta's explosive conclusion was that genetics or innate differences was a "potential partial explanation for group mean differences in intelligence" between blacks and whites. *Defendant Ex 3, Abstract, p.1*. It was controversial, to say the least. *Final Report, p.4 and Ward Dep, pp. 118-119 and McLennan Dep, p. 54 and Bloomberg Dep, p. 323*. Yet as Plaintiff's expert witness asserts without contradiction in this lawsuit:

The Lasker et al. (2019) study is the best study to date to test the hereditarian hypothesis. Five years later, there has been no attempt to overturn its findings, and no new admixture studies have been published that contradict it. If its findings continue to stand, then it would be an important step towards resolving the question of whether average differences in intelligence between racial and ethnic groups within the United States have a partial genetic cause. *Warne Certification* ¶23.

This news must be about as welcome as the devil at prayers. Over seventy years ago, in his brief for the appeal on *Brown v. Board of Ed*, 347 US 483 (1954), Thurgood Marshall had also reminded the Supreme Court of racial differences in intelligence, *e.g.*

Since the days of the Army intelligence-testing program [*viz.* in World War I] a very large amount of material dealing with the question of Negro intelligence has been collected. *The summaries of the results of Garth..., Pinter..., Witty and Lehman... and others make it quite clear that Negroes rank below Whites in almost all studies made with intelligence tests.* Otto Klineberg, Negro Intelligence and Selective Migration (Columbia University Press: New York, NY) 1935, reprinted Greenwood Press Publ: Westport, CT), 1974, p. 9 – *emphasis supplied.*

But Marshall was in effect arguing that, “the difficult problem of racial differences in intelligence might be solved,” even though IQ tests in particular showed that “racial and national groups differ markedly from one another.” Otto Klineberg, Race Differences (Harper & Brothers: New York, 1935), pp. 152-153. This is clear from the statement in the appendix to Marshall’s brief (which can be found on Westlaw at 1952 WL 47265), which Marshall assured the Court was “drafted and signed by some of the foremost authorities in sociology, anthropology, psychology and psychiatry who have worked in the area of American race relations” [as of 1952]. *Id.* at “*Statement of Counsel*” pdf pages pp. 8-9. Citing specifically to the Klienberg studies on intelligence differences referenced above, Marshall’s experts opined that, “The available scientific evidence indicates that much, perhaps all, *of the observable differences among various racial and national groups may be adequately explained in terms of environmental differences.*” *Id.*

at “III” of the appendix. pdf p.13 (*12) (emphasis supplied, citing to footnote 15; see also footnotes 16 and 17)).

Meanwhile, Justice Alito notes in a recent dissent:

Freedom of speech serves many valuable purposes, but its most important role is protection of speech that is essential to democratic self-government, and speech that advances humanity’s store of knowledge, thought, and expression in fields such as science, medicine, history, the social sciences, philosophy, and the arts. *Murthy v Missouri*, 603 U. S. ____ (2024) (Alito, J., dissenting) (citing to see *Snyder v. Phelps*, 562 U. S. 443, 451–452 (2011) and *United States v. Alvarez*, 567 U. S. 709, 751 (2012) (Alito, J. dissenting)).

Pesta’s speech here merits protection under both categories: it was a landmark study of race and intelligence that advances humanity’s store of knowledge in science *and* is essential as our republic considers the unstated premises and assumptions of the civil rights regime bequeathed to our nation by *Brown v Board of Ed* and its progeny.

We should not back away from this latter point, and in fact we absolutely decline to do so. It is not that we are eager to give offense, certainly not to the government power which stands as gatekeeper to success or failure in this lawsuit. Rather, the point is that criticism of government and its policies lie at the vey core of the liberties protected by the First Amendment. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966); *Glasson v. City of Louisville*, 518 F.2d 899, 912 (6th Cir. 1975). Clearly, the civil rights movement was supposed to answer for, and correct, the differences that Marshall himself had pointed out. It failed to do so. Its failure should raise questions among all intelligent and honest men as to whether the premises of the civil rights movement, and the blank slate view of human nature that provided the intellectual underpinning of that movement, were correct. If they were not, we may need to rectify our blinkered vision, readjust our expectations, and stop blaming allegedly poor environments for what are, after all, mostly innate differences.

Criticism of government does not stop with the President and Congress; it extends to policies and premises adopted by the courts, too. Indeed, in some sense it is only fitting that a federal court should practice what is so often preached and protect the thought we hate. *United States v. Schwimmer*, 279 U.S. 644, 654-655 (1929) (Holmes, J., *dissenting*).

BACKGROUND

We do regret, however, that what follows will at times prove tedious and onerous. This unhappy fact is due solely to Defendants' refuge in technicalities. We suggest the court keep its eyes on three crucial facts shown below: First, Pesta clearly indicated his intent to study race and intelligence in what is referred to as his "Third Request." No one of any credibility denies this now; no one ever denied it during Pesta's overly long investigation; and Defendant Ward has specifically admitted it at deposition. Second, the plain language of the model Data Use Certificate ("DUC") form itself permits researchers to change the focus of their research by submitting a new request, a fact again admitted by Defendant Ward at deposition (and by Defendant McLennan as well). And third, both the NIH and CSU continued to approve Pesta's applications for data even after learning that Pesta had studied a genetic basis for racial differences in intelligence and had used what is referred to as the "Dutch server" below, with CSU in particular certifying that Pesta was in compliance with NIH regulations on numerous occasions.

To those three crucial facts, we add a fourth: there is no genuine question of fact that Defendants failed to accord Dr. Pesta a fair investigation. Indeed, the hostility of Dr. Pesta's Investigative Committee (Defendants Mallett, McLennan, and Regoeczi, overseen by Defendant Ward) was so obvious that Defendant Mallett simply conceded that the committee failed in its

duty to conduct their investigation fairly and impartially, as required by CSU's Misconduct Policy, viz:

Q. Do you think that if your co-defendants on the committee thought that Pesta had done harm by his research that you were proceeding against him impartially and fairly?

A. No. When you investigate --

Q. Respectfully, sir, it's a yes or no question.

A. No. Then the answer is no.

Mallett Dep. pp. 39-40.

Defendant Mallett was driven to this concession because he was presented with the evidence of email exchanges among the committee members on November 11, 2021 (*Mallett Ex 1*), along with the tell-tale language in the *Final Report at pp. 4-5*. Defendants Regoecki and McLennan had already managed to insert language into the draft report showing that they disliked Pesta's conclusions, but they wanted to go further. Defendant Regoecki in particular wanted "to more directly address the point about the harm done by his [Pesta's] research." *Mallett Ex 1*. She wanted to "bolster the point that the subject matter of his research is "unethical" and was worried that they had not yet used language that was "strong enough" for those purposes. *Mallett Ex 1*. Defendant McLennan readily agreed. *Id.* Defendant Mallett, despite showing some misgivings, agreed to insert the tell-tale language for such purposes. *Id.* Thus, all three committee members were ultimately united in their desire to send a clear message that Pesta's viewpoint was unethical *per se. Id.*

Nor was the email exchange of November 11, 2021 (*Mallett Ex 1*) the only clear evidence that the Investigative Committee had abandoned any course of action that was fair and impartial. *Defendant Ex 31 at §1(A)*. There was also a draft memo identified as *Mallett Ex 2*. At deposition, Defendant McLennan described this draft memo as "portions of what we considered including in the draft and ultimately decided not to incorporate into the final version of our

report.” *McLennan Dep pp. 80 and 118*. It showed that Defendants McLennan and Regoeczi considered explicitly condemning Pesta’s “research agenda” outright with the following words:

Thus, the Committee members wish to be clear on two points. One, all Committee members condemn Dr. Pesta’s harmful research and regret that such research is connected to CSU — an institution with which all Committee members are otherwise proud to be affiliated.
McLennan Dep, p. 80 and Mallett Ex 2.

Indeed, Defendants McLennan and Regoeczi went still further. Channeling the impulses of a Maoist struggle session, they expressed frustration that Pesta had not denounced his own research: “Furthermore, throughout the entire investigation, Dr Pesta has failed to acknowledge that his research agenda is harmful. The findings of his studies have negative impacts on the community in general as well as CSU specifically.” *Mallett Ex 2*. At deposition, Defendant McLennan reluctantly conceded that he thought Pesta’s research was in fact “harmful” (*McLennan Dep, pp. 67-70*), apparently because the committee thought it was stigmatizing that blacks were supposed to have lower average intelligence due to genetic differences.¹ *Id, pp. 73-75*.

Of course, one cannot “stigmatize” any group by accurately reporting facts about them, and when intellectuals adopt a position of obstinate refusal to face facts, they are already on the road to totalitarianism. To quote Orwell, it is only totalitarians who insist that “you to reject the evidence of your eyes and ears”; it is “their final, most essential command.” Orwell, 1984 (Signet/Penguin: New York, 1977), p. 81. But for over a hundred years, the eyes and ears of intelligence researchers have told us there are differences – even Thurgood Marshall saw as

¹ We are, of course, speaking of average differences in racial IQ – Defendant McLennan understood Pesta did not mean that all blacks had lower IQs than all whites (*McLennan Dep, p. 82*) and knew that Pesta was pointing to average differences between two groups (*Id. p. 83*), which is consistent with overlap between black IQ scores and white IQ scores (*Id.*); in fact he knew that Pesta’s research in “Global Ancestry and Cognitive Ability” revealed overlapping intelligence between the races. *Id.*

much – and “[f]reedom of intellect means the freedom to report what one has seen, heard, and felt, and not to be obligated to fabricate imaginary facts and feelings.” Orwell, “The Prevention of Literature,” in The Orwell Reader (Harcourt Brace & Co: New York, 1984) p. 370–371. In fact, Defendant McLennan himself had admitted earlier in the deposition that he is aware that “blacks and whites have been found by psychologists to differ in average IQ for over 100 years.” *McLennan Dep pp. 52-53*.

The CSU investigation at the heart of Defendants’ affirmative defenses was fatally compromised. Pesta was entitled to “neutral decision makers” who would “give full and fair consideration” to all of the circumstances of his case as it “was presented, considered and decided” (*Meriwether v. Hartop*, 992 F.3d 492, 513 (6th Cir. 2021)), rather than totalitarians who insist that we not see what we see — or what is little better, insist on only one politically acceptable explanation for what is seen. Indeed, this is nothing more than moral camouflage for unlawful viewpoint discrimination within academia, which is a gross violation of the First Amendment. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829—835 (1995).

Defendant Ward acted as the Research Integrity Officer (*Ward Dep. p. 10 and Final Report*) tasked with oversight of the investigation (*Defendant Ex 31 at §2(L)*). Ward was supposed to make sure that the investigation was conducted in a manner that ensured “fair treatment” to Pesta. *Id at §4(E)*.

But with blinkered obstinacy, Ward ignored the tell-tale language at *Final Report at pp. 4-5* that his handpicked crew of investigators (*Ward Dep, pp. 115-116*) were biased against Pesta. Moreover, if credited, Ward’s testimony indicates that the committee members lied to him about their reasons for inserting the tell-tale, condemnatory language at *Final Report at pp. 4-5*. *Ward*

Dep, pp. 244-247. Ward testified that he was told by the rest of the Investigative Committee that such language was actually inserted only to show that the committee had rendered their conclusions without regard to the subject matter of Pesta’s research, not because they wanted to drive home the point that Pesta’s research inquiry was, in itself, unethical and harmful. *Ward Dep*, pp. 244-247. He admitted that if the committee had in fact inserted the condemnatory language to stress that Pesta’s research itself was unethical and racist, it would be “problematic.” *Id.* That “problematic” motive, of course, was precisely why the committee had inserted the telltale language into *the Final Report*, as revealed by *Mallett Ex 1*².

Dr. Pesta’s research area is human intelligence. For the landmark study “Global Ancestry and Cognitive Ability” Pesta used a database known as “The TCP.” *Ward Dep*, p. 153. It is maintained by the NIH or National Institutes of Health. “TCP” is short for “Trajectories of Complex Phenotypes.” *Ward Dep*, p. 153. This same database is sometimes referred to as “PHS000607” (*Ward Dep*, pp. 152-53, 155-156); it is also sometimes referred to as the “Philadelphia Neurodevelopmental Cohort.” *Ward Dep*, pp. 40, 151-152. These references all indicate the same database, viz. the TCP database. *Ward Dep*, pp. 40, 151-152.

The TCP is comprised of massive files that contain all kinds of different data for scholars to study, including genetic data, IQ test scores, socio-economic data, racial categories, and self-identified race, among numerous other variables. *Ward Dep*, pp. 250-252. The statement of Pesta’s censors (Mr. Bird and colleagues — the odious appellation is explained below) indicate that the TCP has also been used in the past to study medical research. *Final Report*, p. 54. This

² Notably, the committee members were intent on condemning the subject of Pesta’s research despite the fact that they had been informed by both Pesta and his censors that the scientific literature indicates that there are in fact gaps in average intelligence between blacks and whites – a scientific finding of which Defendant McLennan was also well aware. *McLennan Dep*, pp 52-53); *Final Report*, pp. 57, 58, 64; see also *McLennan Dep* p 80 and *McLennan Ex 1* (“Bird, 2021” at Abstract and pp. 1, 2, 6, 7, 9.

makes sense because it is common knowledge that the different races (and sexes and ethnicities) have been shown to exhibit different propensities to diseases, *e.g. Bloomberg Dep, pp. 6-7; McLennan Dep, pp. 127-128; Hsu Dep, p. 31.*

When a scholar, such as Pesta, wants to use data from the NIH, he submits an application through his university, which is called a Data Access Request or “DAR.” *Ward Dep, pp. 148-149, 156-158, 261-263.* In order for the NIH to agree to a scholar’s request for access, both the scholar and his university have to commit to abide by the NIH’s terms of data access, which are found in what is called a “Data Use Certification” or “DUC.” *Ward Dep, p. 149.* The DUC is also known as a “Data Use Agreement;” they are one and the same thing. *Ward Dep, p. 296; see also, pp. 214-215.* This is a model form that is appended to a Data Access Request/DAR. *Ward Dep, p. 149.* The DUC states: “Dataset access will be provided to research investigators who, along with their institutions, have certified their agreement with the expectations and terms of access detailed below.” *Defendants’ Exhibit 9 at pdf page 4 (somewhat confusingly labeled 1 of 7).*

An approved DAR application is a three-way contract between: 1) the researcher (Pesta, also identified in the agreement as both a “PI”/“Principal Investigator” and an “Approved User”), 2) his home institution (CSU), and 3) the NIH itself, *viz.* “The parties to this agreement include....” *Defendants’ Exhibit 9 at pdf page 4 (somewhat confusingly labeled 1 of 7).* Under the contractual terms, both the home institution (CSU) and the NIH must “approve” research proposals before a researcher can move forward with his inquiries. *Ward Dep, pp. 156-158.*

Moreover, the contractual relation that was formed by Pesta, CSU, and the NIH provides that the NIH could have called a halt to Pesta’s research any time it had legitimate grounds to question his use of the TCP (as the employer of Dr. Pesta, CSU could clearly have done so as well). Specifically, the DUC which Pesta was later accused of violating, states the following:

The Requester [CSU under the defined terms of the model DUC] and Approved User [which included Pesta under the defined terms of the model DUC, together with his student, John Fuerst] acknowledge *that the NIH or the NIMH may terminate this agreement and immediately revoke access to all NIH genomic datasets at any time if the Requester is found to be no longer in agreement with the policies, principles and procedures of the NIH and the NIMH. Defendant's Ex 9 at "11. Terminations and Violations" at page 6 of 7 (emphasis supplied).*

NB: the model form DUC changed in 2019, which technically means that the parties were bound by a new model form with some of the renewal applications, but inasmuch as the language remained the same between both model forms the changes are not material. *See, for example, Defendant Ex 13 p. labelled 1-10, which contains the newer model DUC form dating from 2019.*

Also, pursuant to the relevant DUC at "6. Data Security and Data Release Reporting" both CSU and Pesta (as the "Requester" and "Approved User," respectively) agreed that "...all copies of the dataset should be destroyed, as permitted by law and local institutional policies, whenever any of the following occurs... the NIMH requests destruction of the dataset... [and/or] the continued use of the data would no longer be consistent with the DUC." *Defendant's Ex 9 at page 3 of 7.*

Thus, if at any time the NIH had found Pesta to be using data in a manner inconsistent with the DUC, it need only have requested destruction of the dataset. Here Pesta's censors raised allegations of misconduct against him very early on (in September of 2019). Yet both CSU and the NIH continued to approve Pesta's applications and renewal applications, as shown below.

One other point bears stressing about the NIH's model forms, which are confusing or at the least "very detailed." *Ward Dep, p. 282.* Although the model forms indicate in several places that responsibility for following the DUC's terms is shared between Pesta and CSU (e.g. "The Requester and Approved Users acknowledge responsibility for ensuring the review and agreement to the terms within this Data Use Certification..." *Defendant's Ex 9 "5. Non-Transferability" at page 3 of 7*), ultimate responsibility for compliance always lay with CSU.

This is clear from both the DUC itself and the “NIH Security Best Practices for Controlled-Access Data Subject to the NIH Genomic Data Sharing (GDS) Policy” (*Defendants Ex 8*) which is incorporated by reference in the DUC. *Defendant’s Ex 9 at page 3 of 7*. The GDS or “NIH Security Best Practices for Controlled-Access Data Subject to the NIH Genomic Data Sharing (GDS) Policy” puts the matter succinctly: “Under the GDS Policy, *the recipient institution is ultimately responsible* for maintaining the confidentiality, integrity and availability of the data to which it is entrusted by the NIH.” *Defendants Ex 8 at p. 1 (emphasis supplied)*. (Further evidence of CSU’s primary responsibility can be found at *Defendant’s Ex 9 at “2. Institutional and Approved User Responsibilities” at page 2 of 7; page 6 of 7*).

If so, then ultimate fault for any failures should also lie with CSU.

But whereas Pesta was sanctioned with the most severe penalty possible for what Defendants maintain were violations of the DUCs, no one else at CSU with oversight of his research was even questioned, let alone punished in any manner. *Ward Dep, pp. 285, 287-288*. For Pesta’s applications, the person in charge of signing and binding CSU to the NIH regulations was a woman in the Office of Research named Lisa Franklin. *Ward Dep, p. 253, 256, 261-262, 270, 285, 287 and Defendants Ex 12*. She was overseen by, or worked in conjunction with Office of Research Director Terri Kocovar/Mary-Therese Kocovar. *Ward Dep, pp. 277, 285 and Bloomberg Dep, pp. 169-171*. The documentary evidence in this case clearly shows that a man in the Office of Research, Attorney Jack Kraszewski, also reviewed Pesta’s applications. *Exhibit 15, Email Trail May 2, 2018*.

But no one within the Office of Research — not Lisa Franklin, nor Terri Kocovar, nor Attorney Jack Kraszewski, nor anyone else—was ever disciplined or sanctioned for the errors that Defendant Ward now says were made in processing Pesta’s applications. *Ward Dep, p. 285*,

287-288. That’s because as far as CSU was concerned, those were simply “honest errors” on the part of Lisa Franklin and those overseeing her. *Ward Dep, pp. 287-288*. Under CSU’s Misconduct Policy, honest errors are not considered to be research misconduct. *Defendants’ Exhibit 31 at §2(a); Ward Dep, pp. 53-54 and McLennan Dep, p. 18*.

No such leniency, however, was shown to Pesta.

The model DUC’s language governs what subjects Pesta was permitted to research using the NIH dataset. A shift in focus should be familiar to anyone who has ever done intellectual work. Quite naturally, the DUC model form contemplates that a researcher might change the focus of his inquiry after acquiring access to the restricted data and provides a method to expand or alter the focus of the originally permitted research. Thus, although the model DUC in question states, “Research use will occur solely in connection with the research project described in the DAR, which includes a 1-2 paragraph description of the research objectives and design,” the very next sentence of the DUC reads, “New uses of these data outside those described in the DAR will require submission of a new DAR....” *Defendants’ Ex 9*.

That sentence clearly means that a researcher can lawfully change his inquiry with the data by submitting a new DAR. Defendant Ward, the acting “RIO” for Pesta’s investigation, a man that the Provost knew was knowledgeable about the meaning of these technical forms and whom CSU relies upon to assure compliance (*Bloomberg Dep, pp 167-168; see also Ward Dep, pp. 8—9 for his self-confessed expertise*), admitted that he held this commonsense understanding of the DUC’s language. *Ward Dep, pp. 169-170, 178-182*.

However, neither institution that has sanctioned Pesta – that is neither the NIH, nor CSU — have abided by the plain meaning of the DUC in question that permitted Pesta to shift the focus of his research with a new DAR or request for TCP data.

Prior to publishing “Global Ancestry and Cognitive Ability” on August 30, 2019, Pesta had applied numerous times for access to the TCP, all of which were approved by both CSU and the NIH. *Ward Dep, pp. 154-158 and Final Report, p. 131*. Pesta’s First Request (which bears the file number “18007” in correspondence with the NIH) was submitted to CSU on April 12, 2018, approved by CSU on May 2, 2018, and approved by the NIH on June 25, 2018. *Id.* In his First Request for TCP data, Pesta proposed to study sex differences in intelligence and brain volume. *Pesta Dep, pp. 80-81 and Defendants’ Ex 7*.

Pesta’s Second Request (which bears the file number “19090” in correspondence with the NIH) was submitted to CSU on July 15, 2018, approved by CSU on July 20, 2018, and approved by the NIH on August 30, 2018. *Ward Dep, pp. 154-158 and Final Report, p. 131*. In his Second Request, Pesta proposed to study mental health outcomes and race. *Pesta Dep, pp. 92-94 and Defendants’ Ex 9; Ward Dep, p. 157*.

Pesta’s Third Request (which bears the file number “19747” in correspondence with the NIH) was submitted to CSU on September 18, 2018, approved by CSU on October 1, 2018, and approved by the NIH on December 10, 2018. *Ward Dep, pp. 154-158 and Final Report, p. 131*. One of the crucial facts in this case is that in his Third Request, Pesta quite clearly proposed studying potential genetic bases for racial differences in intelligence. *Defendants Exhibit 12, Third Request*. CSU’s “Research Integrity Officer” (or “RIO”) Defendant Ward admitted that the Third Request encompassed Pesta’s use of the data for the Lasker, et al. article. Moreover, CSU’s Provost, Defendant Bloomberg, tacitly admitted this as well. *Ward Dep, pp. 158-159, 169 and Defendants’ Ex 12; see also, Bloomberg Dep, pp. 117-120*.

Also, in the course of his research, Pesta uploaded data to a certain foreign server (specifically, a Dutch server known as HIrisPlex-S – *Final Report p. 37*; hereafter the “Dutch

server” or sometime referenced as the “foreign server”) to impute skin color based on genetic data that was in the TCP³. Significantly, both CSU and NIH continued to approve Pesta’s access for the TCP data even after being alerted to fact the that he had used the Dutch server. The very first allegations for research misconduct against Pesta were raised by “Bird et al.” in September of 2019. *Ward Dep*, pp. 43, 46, 86-87, 92-93. These allegations appear in the *Final Report*, pp. 14-15. *Ward Dep*, p. 108. References to Pesta’s use of the Dutch server are among these allegations, specifically see item nos. 3 and 4 of the *Final Report* at p. 14. *Ward Dep*, p. 297. These same “Bird et al.” allegations were also sent to the NIH in September of 2019; in fact, they appear to have been sent to the NIH ahead of when they were sent to CSU. *Final Report*, p. 53.

Yet even after learning of the use of the Dutch server in September of 2019, CSU continued to approve Pesta’s applications for the TCP database; specifically, they approved Pesta’s access for the TCP on December 13, 2019, and December 23, 2019. *Final Report* p. 131 and *Bloomberg Dep*, pp. 148-152. Moreover, CSU continued to approve Pesta’s applications for other restricted access data sets from the NIH on June 24, 2020, and August 12, 2020. *Final Report* p.131 and *Bloomberg Dep*, pp. 150-152.

All told, CSU verified that Pesta was in compliance with NIH regulations no less than four times *after* being alerted to the fact that he had used the Dutch server for his research on the TCP, specifically on December 13, 2019, December 23, 2019, June 24, 2020, and August 12, 2020. *Final Report* p. 131 and *Bloomberg Dep*, p. 151-152; *see also Ward Dep*, p. 261-264 and *Defendants Ex 12*.

³ Pesta did this because he and his research team were pitting “colorism” against genetic ancestry. *Final Report*, pp. 35-38, e.g. “... we used that website to control for color.” at *Final Report*, p. 38. (“Colorism” is the theory that although all black people experience discrimination, it is especially pronounced for darker versus lighter skinned blacks; cf. *Defendants’ Exhibit 3* at §§2.5, 3.3 and 4.1. It is apparently a purely environmental explanation for the black-white intelligence gaps.)

And the NIH, too, continued to approve Pesta's applications (and renewal applications) for restricted data after being alerted to the fact that he had used the Dutch server in his research of the TCP. Specifically with regard to the TCP alone: CSU approved the renewal of the Second Request on September 9, 2019, with the NIH following suit on September 23, 2019. *Final Report, p. 131*. As to the Third Request, renewed access was granted by CSU on December 13, 2019, with the NIH again following suit on February 20, 2020. *Final Report, p. 131*.

Pesta raised this continual renewal in his response to NIH, but the NIH simply ignored the point. In Pesta's later investigation by CSU, he again pointed out that the NIH had continued to approve his access requests to the Investigative Committee (in fact he repeatedly made this point – *Final Report, pp. 86-87 and 157*), but as was their practice, they imitated the NIH and simply refused to acknowledge the argument that he could not have intentionally violated the DUC when the NIH continued to approve his requests, particularly the Third Request which specially noted the use of the data set for intelligence research. *Final Report, p.6; see also, McLennan Dep, p. 138*.

After Pesta published "Global Ancestry and Cognitive Ability," he was immediately beset by various people who wanted to censor his research. Sadly, this is not surprising. Taboos interdicting intelligence research that comes down in favor of what the field calls "hereditarianism" have a long and lamentable history, which go back decades. One of the earliest to feel the heat was pioneering researcher Arthur Jensen, who recounted the following:

... The Berkeley campus was in an uproar for weeks (and sporadically for months and even years thereafter) *with bands of demonstrators disrupting my classes, slashing all the tires on my car and painting swastikas on my office door*. The student paper, The Daily Cal, carried many denunciations and only a few defenses of my position, *and there were demands from dissident groups that I be fired*. The campus police assigned plainclothes bodyguards to accompany me whenever I left my office, *and for several months the campus bomb squad handled the screening and opening all of my mail. even some of*

the unidentified mail received at my home. There were telephoned and mailed threats on my life and on my family: phone calls were routed (and recorded) through the local police station. A number of the calls that came in over one period of several days so worried the police that they urged me and my family to spend a week away from our home at some unknown location, as the police could not provide 24-hour protection. (We stayed with friends in a neighboring suburb: an inconvenience, but as they had a lovely swimming pool, it was a pleasant diversion. Worst of all, from my standpoint, was that my on-going research in the Berkeley schools was immediately terminated and permanently proscribed by the Berkeley school officials. When I asked one official for an explanation, he remarked, "The Berkeley schools are a political unit, not a research institute."

Many other harrowing incidents followed, some taking place when I was lecturing on other college campuses, *both in the United States and abroad, even when my lectures didn't touch on the subjects of genetics or race.* The largest, most tumultuous demonstration I ever experienced was, surprisingly, at the University of Melbourne in 1977, where about fifty policemen had to rescue me from a madding mob. The unprovocative topic of my [undelivered] lecture: The relationship between intelligence and learning... Jensen, A. (1998). Jensen on "Jansenism." *Intelligence*, 26, 181, pp. 197-198 (emphasis supplied).

Professor Jensen was recalling events that had begun *as early as 1969 (Id.)*, but little has changed and such taboos continue to operate through today.

Another salient example of the political animus against researchers who touch this third-rail is noted author Charley Murray, who was deposed in this suit. He recounted that his best-selling book The Bell Curve was controversial because of its discussion of race and IQ. *Murray Dep*, p. 8. That fact should be familiar enough to anyone who recalls the so-called "Bell Curve wars" of the 1990s (as CSU's Provost⁴ does: see *Bloomberg Dep*, pp. 69-72, 320-323), but in any event Dr. Murray testified that after the publication of The Bell Curve he regularly required security when he spoke because of the significant threat of violence. *Murray Dep*, pp. 11-12. Infantile (but aggressive) crowds would show up at his college appearances, stand, chant

⁴ Provost Bloomberg has now succeeded to the Presidency of CSU. But inasmuch as she was the Provost throughout the events in question, for the sake of clarity, that is how she will be referred to here.

offensive matter, and block entrance and exit points. *Id.* Dr. Murray placed his travails in a continuum with those afflicting other researchers on intelligence who have openly discussed the hereditarian position, such as Professor Jensen; his co-author on The Bell Curve (Dr. Richard Herrnstein), and Nobel Prize winner Dr. James Watson. *Murray Dep*, pp. 14-18; *see also*, *Bloomberg Dep.*, p. 322-323. (Murray also revealed the even before The Bell Curve was published he was forced to separate from the Manhattan Institute because of his research for that book. *Murray Dep*, p. 37.)

Over two decades after Murray published The Bell Curve, he was still a target for activists who wanted his views (even views on other topics) silenced. Thus, when he went to his daughter's alma mater in 2017 (Middlebury College), he could not lecture because of a violent crowd chanting, "Charles Murray, go away, racist, sexist, anti-gay." *Murray Dep*, pp. 14, 19—25. The protest devolved into an outright riot, with college students "climbing onto the roof" of Murray's car as he tried to leave, "slamming their signs and so forth into the windows." *Murray Dep*, p. 24; *see also Bloomberg Dep*, p. 330. Middlebury's ardent votaries of tolerance even managed to assault one of Murray's hosts, inflicting "strained tendons and a concussion" which subsequently prevented her from teaching for the rest of the semester. *Murray Dep*, p. 24.

Professor Bickel once noted that, "Words and concepts such as those of due process and equal protection, are only words and concepts, to be sure, but they breed attitudes, they tend toward a mindset...." Bickel, The Morality of Consent (New Haven: Yale University Press – 1975), p. 6. To which we might add: the mindset they breed is itself often one of fanaticism. People holding them tend to forget that, "[t]olerance is a two way street." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). Especially at colleges, it seems that egalitarian taboos are backed by vicious people; they have been for decades; and the narrow-minded men pushing them now

began to afflict Pesta. More particularly, in September of 2019, CSU received the “Bird et al. allegations.”. *Ward Dep*, pp. 86-87. These are the allegations from Mr. Kevin Bird, Mr. Os Keyes, Dr. Jedidiah Carlson, and Dr. Cathryn Townsend, which are found at Defendant’s Final Report. *Final Report*, pp. 14-15. Notably, when the CSU Defendants belatedly undertook their interview of Mr. Bird and his colleagues on September 30, 2021 (*found at Final Report* pp. 52-70), one of the very first things they discovered was that Mr. Bird and his colleagues wanted to use – or rather abuse – regulations as a means of silencing Pesta’s viewpoint on the race/IQ debate, viz.

Kevin Andrew Bird: I yeah so I am a PhD candidate studying evolutionary biology and plants, mostly, but I have – interest isn't quite the right word - but I pay attention to racist applications of genetic data and groups that do publish research aligning one way, especially many of the co-authors in this paper. And recognized [sic] that the data they are using was published previously in a major NIH study and was involved for medical research and things that that were far from the application in this paper. And so, I think Jed kind of shares a similar interest or kind of follows a similar beat and knows quite a bit about things in the NIH data use [agreements] and things like that. Cathryn has a similar interest. And so we started looking into, was this actually an appropriate use of NIH data? Are there, or was there, something kind of gone wrong when it was used for a paper like this. *Final Report*, p. 54 – emphasis supplied

The word “so” in the underlined sentences above is a common adverb which here means “in consequence of or as a result of.” *Ward Dep*, p. 355. Thus, Bird et al. were clear that they began looking into the technicalities of Pesta’s data access requests to the NIH with the sole purpose of interdicting Pesta’s point of view in this controversial field.

Censoring other academics appears to be a special devotion for Mr. Bird, who played a major part in 2020 in driving Dr. Stephen Hsu from the administration of Michigan State University for merely discussing other scientists’s hereditarian research in blog posts. *Hsu Dep*, pp. 17-29, 30-35. Like Dr. Murray, Dr. Hsu was deposed for this suit and recounted his

experiences with the taboos (and Mr. Bird's anti-intellectual advocacy). Dr. Hsu — a PhD in theoretical physics, a teacher of quantum mechanics and astrophysics, a student of Nobel prize winner, Dr. Richard Feynman, an autodidact who has mastered enough genomics to lecture in the field at noted institutions from Princeton to the University of Chicago, and around the world (*Hsu Dep*, pp. 6-12) — is clearly a brilliant man, perhaps a genius. But such are the taboos surrounding race that even he was not spared reprisal from men like Bird for merely discussing racial differences in intelligence, a fact that CSU's Provost should have understood. *Bloomberg Dep*, p. 321.

Such is the backdrop to the fraught world of intelligence research, and the intellectual milieu in when men such as Dr Pesta are forced to operate. It is a world that Provost Bloomberg was familiar with, for she betrayed knowledge of both Dr. Murray and Dr. Hsu's travails. *Bloomberg Dep*, pp. 69, 321. Unfortunately for Pesta, when Mr. Bird and his kind showed up at CSU, they found kindred spirits and ready acceptance.

THE NIH ACTIONS

Thus, on September 19, 2019, apparently spurred on by the likes of Mr. Bird (*Bloomberg Dep*, pp. 142-143 and *Final Report*, p. 53.), NIH sent an email to Pesta and several people within CSU's Office of Research who would have been responsible for ensuring compliance with access to the TCP (such as former "RIO" Jerzy T. Sawicki, and Director Mary-Therese Kocovar — see *Ward Dep*, pp. 47-48, 277, 284-285). *Exhibit 1 to Pesta Certification, NIH Email of September 19, 2019*. As usual, the email makes for tedious reading through obscure terminology. But three things are crystal clear.

First, the NIH did not inquire about the DUC for Pesta's Second Request. *Id.* The NIH email of September 19, 2019, raises five specific inquiries (two of which are broken into

subparts), but none of them address the DUC for Pesta's Second Request. To be sure, there is concern over Pesta's use of the TCP database (that is what the several references to "phs000607" mean). But the email never mentions "Project 19090" which was the Second Request. Instead, it mentions "Project 19747" which was the Third Request Pesta had submitted for access to the TCP, to study racial differences in intelligence. *Id.*

Second, the email does not mention Pesta's use of the Dutch server for his research. *Id.* Instead, the non-transferability issues raised in the email pertain to the access Pesta gave (or did not give) to his co-authors on "Global Ancestry and Cognitive Ability." *Id.*

Third, the email makes no inquiry whatsoever about not reporting "Global Ancestry and Cognitive Ability" during any project renewals. *Id.*

The very next day, September 20, 2019, Pesta submitted an email response to the NIH which effectively answered all five points of inquiry that were raised by the NIH. *Exhibit 2 to Pesta certification, Pesta Email dated September 20, 2019.* CSU, the "Requester" under the defined terms of the DUC, did not respond at all to the NIH's inquiry, although the NIH had clearly also expected a separate response from CSU through its "Signing Official." *Final Report, p. 17.*

After the NIH's September 19, 2019, email and Pesta's response the very next day, there were no further specific inquiries or exchanges between the NIH and Pesta of any substance. *Pesta Certification ¶5.* The entirety of the NIH's specific investigation of Pesta thus consisted of the single email exchange between September 19-20, 2019. Then, over 600 days later, on May 27, 2021, the NIH answered Pesta's response of September 20, 2019, with a letter addressed to CSU's Senior Vice President and Associate Vice President of Research (but not to Pesta, the

additional party to the contract created by the NIH's DAR-DUC process for restricted data).

Final Report, pp. 16-18, being the NIH/Lauer Letter of May 27, 2021.

The May 27, 2021, Letter from the NIH was authored by Dr. Michael Lauer. *Id.* It summarily "convicted" Pesta of technical violations on the three grounds above, which the NIH had never even asked Pesta about in its September 19, 2019, complaint letter to him.

First, Pesta was found guilty of violating the DUC for the Second Request by studying race and intelligence. Curiously, bizarrely, the facts pointed to by Dr. Lauer/the NIH related not to "Global Ancestry and Cognitive Ability," but to the pre-print of a different academic paper on Hispanic IQ. Second, Pesta was found guilty of violating the non-transferability terms of the DUCs for both the Second and Third Request by uploading data to the Dutch server to predict eye and skin color. And third, Pesta was found guilty of not reporting "Global Ancestry and Cognitive Ability" on a renewal application. *Id.*

Bear in mind that this entire time, had Pesta actually committed any serious violations of the terms of the DUC while accessing the TCP, the NIH could have terminated his access under "11. Terminations and Violations" of the model DUC form. *See Defendant's Ex 9 at page 6 of 7.* But they did not. Instead, as set forth above, the NIH continued to grant Pesta access to restricted data (both the TCP database and even another restricted database known as "the ABCD Data set"), with access granted to one or both of those sets by the NIH on September 23, 2019, and again on February 20, 2020. *Final Report*, p. 131 and *Bloomberg Dep*, pp. 87-88.

Moreover, no explanation exists for why NIH was not alerted to these issues, genuine or not. The "Bird et al." censors had sent the correspondence found at *Final Report* pp. 14-15 to NIH even before it was forwarded to CSU in September of 2019 (*Final Report*, p. 53) and that correspondence raises both Pesta's research into race and intelligence and his use of the Dutch

server (*Ward Dep*, p. 297); furthermore, NIH certainly knew that Pesta had published “Global Ancestry and Cognitive Ability” when they sent the email of September 19, 2019 and thus could have raised any issues regarding to failure to appropriately report the publication at that time.

In any event, Pesta responded by appealing the NIH’s three findings, arguing that: a) he had proposed to study race and intelligence in his Third Request for the TCP; b) that the NIH clearly does *not* prohibit uploading TCP data or derivatives of data to the Dutch server because the NIH has allowed other researchers to upload such data to that same server, as evidenced by the academic paper on skin cancer in whites and Hispanics (a/k/a “Jorgenson et al., 2020”) and furthermore, that both the NIH and CSU had continued to approve his access to restricted data; and c) that the NIH had misinterpreted its own regulations on when official publications must be reported. *Exhibit to Pesta Certification, Pesta NIH Appeal of June 21, 2021*.

The NIH responded to Pesta’s appeal on August 17, 2021, by ignoring every point Pesta had made and adhering to their prior determination. *Final Report*, pp. 20-23. On the first point, the NIH simply asserted that Pesta’s Third Request did not mean he was free to study race and intelligence because his Second Request had only described studying whether admixture analysis shows that global ancestry⁵ predicts mental health outcomes in the Sentence Request. *Final Report*, pp. 20-21. Dr. Lauer/the NIH again refers to the model DUC language that states, “Research use will occur solely in connection with the research project described in the DAR, which includes a 1-2 paragraph description of the research objectives and design,” *and then says absolutely nothing about the very next sentence which reads, “New uses of these data outside those described in the DAR will require submission of a new DAR....”*

⁵ Or in layman’s terms, “race.”

The interpretation of contractual language is one of law which the court itself should decide. *Coles v. Youngstown Sheet & Tube Co.*, 11 Ohio St. 2d 45 (1967). But it bears stressing that when questioned about the DUC provision allowing researchers to request expanding their data use through a new DAR, Defendant Ward agreed that a scholar who submitted a new DAR would thereby be permitted to change his research inquiry under the terms provided by the NIH. *Ward Dep.*, pp. 169-170. To quote Dr. Ward: “Correct. So then under the third request, I guess under the new DAR, he could conduct that research [on race and intelligence] then.” *Ward Dep.*, p. 182. Defendant Ward could not defend the NIH’s selective reading of the DUC and its choice to ignore the expressly stated ability to expand data use to other topics through a new DAR. (This prompts the question of why he did not quickly and informally resolve this baseless allegation against Pesta, which Ward was obligated to do under the CSU’s Misconduct Policy pursuant to §§3(C) and 4(C). *Defendant Exhibit 31.*)

As to the second point that Pesta had refuted, Dr. Lauer peevishly insisted that Pesta should have disclosed his use of the Dutch server ahead of time. *Final Report*, p. 21. Dr. Lauer said nothing at all about the NIH’s continued approval of Pesta’s applications, nor did he acknowledge that the NIH had allowed the “Jorgenson et al., 2020” researchers to upload the same TCP data to the same Dutch server. *Id.* (The third point, regarding publication dates, is too trivial to even discuss. Suffice it to say that even CSU’s Investigative Committee could not sustain this charge. *Cf. Final Report* pp. 6—8.)

As the court ponders the flimsy findings of the NIH, it should bear in mind that Defendants were obligated to conduct their own independent examination under Ohio Administrative Code §§3344-28-01 et seq./Misconduct Policy at *Defendants Ex 31*, not to accede to any findings by the NIH. *Bloomberg Dep.*, pp. 115-117; *see also, Ward Dep.* pp 172-173.

We would be remiss not to point out evidence that the NIH has succumbed to viewpoint discrimination and has begun to actively censor research for the sake of political ideals (which are, naturally, left wing and egalitarian). *Warne Certification*, ¶25, citing to *James Lee*. (2022, October 19). “Don’t even go there.” *City Journal*. <https://www.city-journal.org/article/dont-even-go-there> Indeed, other apparently well-respected researchers simply assume that the NIH has adopted policies that interdict studying the viewpoint that Pesta reached in his conclusions. *Final Report*, pp. 61, 75-76, 80. So it is not just universities which have begun to “pick sides” *Meriwether* at 498. The taboos surrounding race have grown so onerous that even scientific agencies within the federal government itself have begun to do so. We respectfully remind the court that evidence that a government agency is attempting to suppress content or viewpoint warrant greater scrutiny (*Gerber v. Herskovitz*, 14 F.4th 500 (6th Cir. 2021)), lest regulations slip from neutrality to concerns about content and viewpoint. *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 101 (1972), *overruled on other grounds by Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); *see also, City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986).

Despite their flimsy nature, CSU sanctioned Pesta based on the NIH findings even before their own flawed investigation. On or about June 9, 2021, Pesta was issued a Letter of Reprimand signed by Dr. C. Forrest Faison III (CSU’s Senior Vice President, Research and Innovation) and Dr. Kenneth B. Kahn (Dean of CSU’s College of Business). *Bloomberg Dep*, pp. 214-218 and *Ex Bloomberg 2, Email Trail dated December 7, 2021*. The Letter of Reprimand dealt Pesta a number of sanctions, including the denial of faculty merit raises for three years and the need to undergo CSU’s “Responsible Code of Research” training prior to his next research

study. *Id.* (The Letter of Reprimand would be omitted from the Final Report later produced by Defendants, in clear violation of §6 (J) of the Misconduct Policy. *Defendants Exhibit 31.*)

Notably, the Investigative Committee which later concluded that Pesta had committed research misconduct under CSU's Misconduct Policy, did not concur with all, or even with a majority of the NIH's flimsy findings. Specifically, the only NIH finding that the Investigative Committee did concur with was that Pesta had violated the non-transferability terms [re the Dutch server] of the DUCs for the Second and Third Request for the TCP. *Final Report*, pp. 6-7.

CSU'S REVIEW AND INVESTIGATION

Defendant Ward was given a mandate by CSU's Provost to review the allegations against Pesta, which he began to undertake at some point in late 2020 (that is before the NIH came back with its own findings on May 27, 2021). *Ward Dep*, pp. 329-329 and *Ex Ward 5*. At the time, these allegations would have only been those of "Bird et al." at *Final Report*, pp. 14-15.

CSU was supposed to be following Ohio Administrative Code §§3344-28-01 et seq. when conducting reviews of allegations of academic misconduct. *Ward Dep*, pp. 11-12. (Ohio Administrative Code §§3344-28-01 et seq. is referred to throughout as the "Misconduct Policy" or simply the "Policy.") CSU's Misconduct Policy makes clear that faculty are entitled to "full freedom in research and to full freedom in the publication of the results of those research endeavors"; moreover, the Misconduct Policy underscores this by stating, "The primary responsibility of the faculty is to their subject and to seeking and stating the truth." *Defendant Ex 31 at §1(A)*. This makes sense: no one truly interested in free inquiry would permit technicalities to interdict substantive research because that would amount to the tail wagging the dog, a point Defendant Bloomberg indicated that she understood. *Bloomberg Dep*, pp. 65-66.

Totalitarians who seek to suppress truth, however, take the contrary approach. Technicalities are useful to such creatures because their mindset is one with that of the devoted Stalinist Lavrenti Beria, to whom we attribute the infamous phrase, “Show me the man and I’ll find you the crime.” To such men, the primary focus is first and foremost the man himself (or his forbidden thoughts); the “crimes” are then manufactured as pretexts to cover what is the totalitarian’s true animus. Technical violations are useful cover here because technicalities are numerous and obscure (a point doubtless driven home by these submissions), and thereby lend themselves to abuse by such unscrupulous men. CSU’s Misconduct Policy, with its emphasis at the outset on a faculty member’s primary responsibility should prohibit this. So too should settled law in the Sixth Circuit, *e.g. Bible Believers v. Wayne Cnty.*: “[W]hen passing on the validity of a regulation of conduct, which may indirectly infringe on free speech, this Court ... weigh[s] the circumstances in order to protect, not to destroy, freedom of speech.” 805 F.3d 228, 234 (6th Cir. 2015) (*quoting Cox v. Louisiana*, 379 U.S. 536, 578 (1965) (Black, J., concurring)).

However, Defendants here showed themselves worthy apostles of Beria and the like.

Thus, throughout CSU’s investigation, Pesta was given no credit whatsoever for the fact that he was attempting to fulfill his primary responsibility under the Misconduct Policy of seeking and stating the truth about a pressing issue in his subject, which was intelligence research. *Cf. Ward Dep, pp. 18-19.* Instead, Defendant Ward testified that although he knew the entire Misconduct Policy should be construed around the primary responsibility of Pesta to seek and state the truth (*Ward Dep, pp. 12-13, 36*), and that Pesta’s primary responsibility under the precise wording of the code took precedence over the manner in which he conducted his research (*Ward Dep, pp. 25-26*), he avoided living up to this crucial aspect of the Policy. Thus Ward, as

the RIO overseeing Pesta's investigation, claimed he was simply not interested in whether Pesta had fulfilled his primary responsibility under the code. *Ward Dep, pp. 33-35*.

But the fact is that when Ward began his review, the Provost had specifically charged him with exploring whether Pesta had in fact fulfilled his primary obligation under the Misconduct Policy. *Ward Dep, pp. 329-339 and Ex Ward 5*. At the outset of his review, Ward had received an undated memo from the Provost's office which put him under a mandate to investigate three points. *Id.* The first and third points were eventually undertaken by the committee he later appointed (they were misrepresentation of the Data Access Request that led to "Global Ancestry and Cognitive Ability" and the possible IRB violation, which are found at *Final Report pp. 6-7*).

But the second point is significant because there are no signs that it was explored by the Investigative Committee that was later impaneled. That second point of investigation was, "Possible consistent misrepresentations of the data measured, the statistical analyses, and reported results such that a reanalysis of the same data would not replicate the findings in Pesta's publications." *Ex Ward 5*.

In other words, if another objective researcher tested the TCP database, would it bear out Pesta's conclusion, which was that genetics was "a potential partial explanation for group mean differences in intelligence between blacks and whites?" *Defendants Ex 3 at Abstract*. Because if Pesta had intentionally falsified his results, that would clearly have amounted to a much more serious bit of research misconduct than technical errors on a data access form, or failure to secure IRB approval that no one else realized was necessary, either. The second point clearly speaks to Pesta's primary responsibility under the Misconduct Policy. (Even the evasive Defendant Bloomberg conceded the obvious with respect to this issue. *Bloomberg Dep, pp. 66-68*.)

Yet that issue was never taken up by the Investigative Committee. Indeed, Ward never even charged the committee with looking into this issue. *Final Report*, pp. 12-13. Why was what could have been the most serious allegation against Pesta passed over in silence?

The answer seems to be: because like good little totalitarians, Defendants did not want to know the answer to this question – *and they did not want to know the answer to this question because they fear that Pesta is likely correct*. Indeed, the evidence strongly suggests that Defendant Ward looked into this issue just long enough to realize that Pesta had in fact answered a long standing inquiry within his field, but the implications were too politically explosive.

Defendant Ward admitted to reviewing all three of the points raised in the Provost's memo at *Ex Ward 5. Ward Dep*, pp. 330, 333. Indeed, Ward was a diligent employee for CSU, one who did not ignore mandates from the provost's office. *Ward Dep*, p. 332. But Ward's testimony here was strangely defensive, even more so than usual. *Ward Dep*, pp. 331-333. The court can see that he was evasive, consistently refusing to squarely answer questions at this point; indeed he rarely failed to qualify his responses in a manner that sidetracked the questions. At one point in the dance, counsel was forced to remonstrate with him thus:

Dr. Ward, in many of your answers, I'll ask you a question, and you'll come back, and you answer a slightly different question. I didn't ask you if you went into detailed study or you followed this exactly. I asked you if you looked into the subject broadly as I think you probably were obligated to do. That's my question. Did you look into the subject broadly?
Ward Dep, p. 334.

Instead, Ward continued to play Terpsichore by refusing to squarely answer the question.

A few facts, however, are crystal clear. At the outset, the Provost's office gave Defendant Ward a mandate to investigate whether Pesta had falsified his data, which was surely the most egregious thing Pesta could have done in violation of what the Misconduct Policy describes as faculty member's primary responsibility. *Bloomberg Dep*, pp. 66-68. Defendant Ward did

undertake an investigation of this point to some extent. *But that point is thereafter dropped from all subsequent review of Pesta by Defendants in favor of what are obviously lesser concerns.*

And there is no credible explanation for why it was dropped. *Bloomberg Dep, pp. 311-314.* Thus, Ward denied that misrepresentations of the data would fall under the research misconduct policy (*Ward Dep, pp. 337-338*), which is not only wrong, but plainly ridiculous. Data misrepresentation is obviously research misconduct and is specifically defined as such at §2(A) of the Policy. *Defendants Exhibit 31.* Ward’s qualified answer, that he “did not do detailed research into the statistical analyses and whether the data could be replicated” (*Ward Dep, p. 332*), apparently because that would have required “an external expert or someone else to perform that if we were to pursue it” (*Ward Dep, p. 333*), is just another feeble excuse in light of the Provost’s memo urging Ward to “assemble a committee comprised of both internal and external committee members whose expertise will allow them to conduct the necessary analyses identified above.” *Ex Ward 5.*

At CSU, where Pesta was concerned, it was out with Galileo — and in with Beria.

On or about July 26, 2021, Defendant Ward impaneled an Investigative Committee consisting of Defendants Mall, McLennan, and Regoeczi. *Final Report, p. 12 and Ward Dep, p. 115.* They conducted various interviews with some (but not all) complainants against Pesta, and eventually transmitted a “Final Report” to the Provost, Defendant Bloomberg, who issued a Letter dated January 13, 2022, which set the stage for stripping Pesta of tenure and firing him. *Final Report, pp. 163-170 and Defendant Exhibit 24, Bloomberg Termination Letter dated February 28, 2022.*

We have already demonstrated that Defendants intentionally abandoned any course that could be construed as fair and impartial with regard to Pesta and will not repeat the evidence

from *Mallett Exhibit 1* and *Mallett Exhibit 2* here. But we can add that for people allegedly concerned with procedural missteps, the above Defendants proved guilty of numerous violations of the Misconduct Policy themselves — violations which were both procedural and substantive.

Specifically, Defendants:

- 1) violated §1(A) of the Policy by ignoring that Pesta had fulfilled his primary responsibility to seek and state the truth in his subject matter. *Ward Dep, pp. 18-19*. Defendants McLennan and Mallet's answers under oath were consistent with the Defendant Ward's indifference to Pesta's primary responsibility: neither one gave Pesta any credit for attempting to seek and state the truth within his field, even though Defendant McLennan at least understood that Pesta fulfilled his primary responsibility under the code. *McLennan Dep, pp. 14-15, 17, 111-112; see also, Mallett Dep. pp. 25-26*.
- 2) again violated §1(A) of the Policy by elevating trivial and overly technical details to the same level of that of a researcher's primary responsibility. *Ward Dep, pp. 33-35; McLennan Dep, pp. 14-15, 17; see also, Mallett Dep. pp. 25-26*.
- 3) violated §§3(C) and 4(C) of the Policy by failing to immediately assess and informally resolve allegations made against Pesta, including by importing a wholly unsupported and unwritten provision into the Policy at the urging of the NIH. *Ward Dep, pp. 46, 47-48, 52-53, 56-61, 63-64, 86-87, 90-91, 95-96*.
- 4) violated §3(D) of the Policy by moving straight to the highest level of review (viz. "Investigation") without the consent of Pesta. *Ward Dep, pp. 63-65, 113-114; Cf. Defendants' Ex 31 at §3(c), §5 and §6*.
- 5) violated §§3(N) and 5(P) and (O) of the Policy by resting the decision to move straight to the highest level of review (viz. "Investigation") with Defendant Ward (the "RIO" under the

Policy), rather than Defendant Bloomberg (as Provost, the “deciding official” under the Policy). *Final Report*, p. 3.

- 6) violated §§3(K) and 5(B) of the Policy by failing to provide Pesta with the opportunity to question witnesses before an Inquiry Committee composed of at least two individuals who were unbiased and qualified to judge the evidence against him. *Ward Dep*, pp. 67-68, 68-69, 71, and 73.
- 7) again violated §3(D) of the Policy by failing to appoint committee members who had the necessary and appropriate expertise to carry out a thorough and authoritative evaluation of the evidence. *Ward Dep*, pp. 115. Instead, Defendant Ward appointed Defendant Mallett, for one, who never even understood something as basic as how the DUC forms that Pesta submitted to the NIH worked. *Mallett Dep*, p. 103 (showing Mallett confusing the DUC with the data access request itself.) In fact, Defendant Mallett did not even know what the term “model DUC” meant; he testified that he had “not heard that term.” *Mallett Dep*, p. 168. Also, Defendant Mallett did not understand that the TCP database was in fact the same thing identified in the NIH forms as “phs000607.” *Mallett Dep*, pp. 100, 102. And although the very first charge that Defendant Mallett voted to sustain against Pesta was that Pesta had allegedly violated the DUC for the Second Request, he was not even sure that either he or anyone else on the committee actually read the DUC for the Second Request for TCP data. *Mallett Dep*, pp. 103-104. Turning to committee member Defendant McLennan, he proved little better than Defendant Mallett in bringing the “necessary and appropriate expertise” “to carry out a thorough and authoritative evaluation of the relevant evidence.” Throughout the investigation, it was Defendant McLennan who laid special emphasis on the alleged IRB violation by Pesta. e.g. *Final Report*, pp. 57, 66, 91-92, 95, 119-121. Yet, Defendant

McLennan could not decipher the plain language of the model DUC which indicated that it was CSU who continued to assert that Pesta was in compliance with “relevant institutional policies and applicable federal, state, or local laws and regulations including IRB if required” while it continued to approve access to the restricted NIH data after allegations of misconduct had been raised. *McLennan Dep, pp. 90-91; Cf. Defendant Ex 12 Model DUC.*

- 8) again violated §1(A) of the Policy by instead appointing committee members who proved to be openly biased and unfair. (see below)
- 9) Perhaps most seriously, violated §§3(K) and 6(I) of the Policy by refusing to let Pesta question witnesses before the Investigative Committee that was appointed. Defendants Ward, Mallett and McLennan had no coherent explanation for refusing to provide this safeguard to Pesta. *Ward Dep, pp. 71-78, 124; Mallett Dep, 70-77; McLennan Dep, pp. 120-123.*

Defendant Bloomberg testified that she understood that Pesta had been denied the safeguards of §§3(K) and 6(I) of the Misconduct Policy (*Bloomberg Dep, pp. 294-296, 300-301, 308*), but essentially washed her hands of the matter because the responsibility was that of Dr. Ward. *Bloomberg Dep, pp. 308-309.* (However, see *Bloomberg Dep, pp. 162; 163-164*, where Defendant Bloomberg testified that she was charged with seeing that the Misconduct Policy was followed.)
- 10) violated §6(H) of the Policy by failing to formally interview and record one of the chief complainants against Pesta — the NIH itself in the person of Dr. Lauer. *Ward Dep, p. 125, 128, 13-138 and Ward Ex 2.*
- 11) again violated §1(A) of the Policy by simply ignoring each and every argument Pesta had made that refuted the Investigative Committee’s findings. *McLennan Dep, p. 138; Bloomberg Dep, pp. 185-187; Final Report, pp. 152-162.*

- 12) violated §§3(B) and (E) of the Policy by permitting Defendant Ward to make substantive changes to the draft of the Final Report, substantive changes which ensured that Pesta could be found guilty of misconduct at the appropriate evidentiary standard. *Ward Dep, pp. 248, 317-321 and Ward Ex 4.*
- 13) violated §6(J) of the Policy by failing to include in the Final Report any of the intermediate administrative actions that CSU had already taken against Pesta regarding the NIH's findings. *Bloomberg Dep, pp. 214-218, 234-248 and Ex Bloomberg 2, Email Trail dated December 7, 2021.*
- 14) violated §6(K) by issuing a decision based on matters that went beyond the findings of the Investigative Committee, for example, by supplying findings that were not made by the Committee (*Bloomberg Dep, pp. 268-269; cf. McLennan Dep, p. 110*), considering matters outside the Final Report as furnished by the Committee (*Final Report, pp. 166-168*), and sustaining the findings of the Committee even where the Provost herself failed to agree with the often farcical findings of the Committee. *Final Report, pp. 164, cf. Final Report, pp. 6-8; Bloomberg Dep, pp. 164-165.* Indeed, at deposition, Provost Bloomberg could not coherently defend agreeing with the Investigative Committee's ridiculous findings and instead took refuge in looking at what she repeatedly referred to as "the totality" of Pesta's alleged misdeeds. *Bloomberg Dep, pp. 169, 185, 196-197, 200-201, 203, 204.* A representative quote: "By the time it got to my desk, I was looking at the totality of information, not specific things." *Bloomberg Dep, p. 169.*

The rule is that "At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny."

Ward v Polite at 740 (citations omitted). That point is clearly reached here. At least fourteen substantive and prejudicial deviations from a policy do not reflect a neutral standard, and Defendants will not be able to take refuge in the Misconduct Policy, which they butchered in their dishonest vendetta against Pesta.

Moreover, Defendants certainly cannot run the gauntlet of strict scrutiny because if Pesta committed any violations at all, they were *de minimis* violations which were shared by others at CSU — including Defendant Ward himself (*Ward Dep pp. 271-272*) — and the others were let off with stern warnings and perhaps additional training. *Ward Dep, p. 285, 287-288*. Thus, there was no justification for visiting Pesta with the ultimate sanction of termination.

The Research Integrity Officer (a/k/a the “RIO,” here Defendant Ward), who had formed the Committee, held hostilities of his own (*Ward Dep, pp. 229-231*), a fact which explains the numerous prejudicial steps he took to violate CSU’s procedural code during Pesta’s investigation. CSU’s Provost (Defendant Bloomberg), who was also hostile to Pesta’s research conclusions (*Bloomberg Dep, pp. 21, 22-24, 39*), countenanced these procedural missteps, and added a few more of her own. Armed with the Investigation Committee’s tainted and unsupportable findings, CSU’s Provost visited the harshest penalty possible on Pesta: she stripped him of tenure and fired him. *Final Report, pp. 163-170 and Defendant Exhibit 24, Bloomberg Termination Letter dated February 28, 2022*.

**PESTA PREVAILS ON HIS PRIMA FACIE CASE FOR
FIRST AMENDMENT RETALIATION AS A MATTER OF LAW**

Summary judgment is now appropriate because there is no genuine question that Pesta’s speech merited protection; there is no genuine question that Defendants took action against Pesta that would deter a man of ordinary firmness from engaging in the same kind of research; and there is no question that there is a causal connection between elements one and two. Even

viewing the evidence in the light most favorable to Defendants, it is so one sided that Pesta must prevail as a matter of law. *Back v. Nestle USA, Inc.*, 694 F.3d 571, 575 (6th Cir. 2012) (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986)).

For First Amendment retaliation, Pesta must show:

he engaged in constitutionally protected speech or conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct; (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by his protected conduct.

Kubala v. Smith, 984 F.3d 1132, 1139 (6th Cir. 2021)

The first prong, whether Pesta was engaged in constitutionally protected speech, is itself subdivided into two questions: First, was he speaking on a matter of public concern? And second, was his interest in doing so greater than the university's interest in promoting the efficiency of the public services it performs through him? *Meriwether v. Hartop* at 507-8 (quotations and citations omitted). Notably, these two inquiries are determined by the court itself: the question of whether an employee has engaged in protected speech is one of law. *Mayhew v. Town of Smyrna*, 856 F.3d 456, 464 (6th Cir. 2017).

Pesta's speech in "Global Ancestry and Cognitive Ability" clearly constituted speech on a matter of public concern. Pesta's research indicated that genes were a "potential partial explanation for group mean differences in intelligence." *Defendants Ex 3, Abstract*. The questions of why and how blacks and whites differ in intelligence have been the subject of debate for over a century. *Warne Certification* ¶¶10–17. Put another way, as Pesta represented before the Investigative Committee (Defendants Mallet, McLennan and Regoeczi, along with Defendant Ward), "The nature-nurture question respecting the cause of cognitive ability differences across SIRE [*viz.* Self-Identified Race and Ethnic groups] is an open line of inquiry."

Final Report, p. 152. No one contradicts this. Indeed, at deposition, the lone fellow psychologist on the Investigative Committee, Defendant McLennan, conceded that this question is indeed “an open line of inquiry in his [Pesta’s] field.” *McLennan Dep*, pp. 111-112.

Although rarely acknowledged, the fact of average racial differences in intelligence holds heavy implications for social policy, for researchers over the past several decades have now shown that intelligence correlates with numerous metrics of well being. Indeed, “Intelligence is positively correlated with leadership attainment, good physical and mental health, longevity, and higher occupational status and job performance. Conversely, intelligence is negatively correlated with criminal behavior, divorce, and other undesirable life experiences. Often, individual differences in intelligence are more important determinants of life outcomes than other psychological variables (such as personality).” *Warne Certification*, ¶12. Moreover, “An unavoidable consequence of the average difference in intelligence among racial and ethnic groups is that different groups experience different rates of life outcomes because of their differing IQ distributions. This is due to the relationship between intelligence and life outcomes...” *Warne Certification*, ¶16.

Thus, Pesta’s speech collides with the (often unstated) premises of the civil right regime laid down by the federal courts. Indeed, much of our government policy assumes that group equality is a laudable goal and within our reach. *e.g. Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686 (6th Cir. 1981): “Plainly, racial harmony and equality is a substantial state interest...” But even those policies must admit of scrutiny under the First Amendment.

That means accepting debate on all sides of controversial issues. And nowhere is that more true than in an academic setting. As Justice Frankfurter once reminded us (in another case involving academic freedom), “Education is a kind of continuing dialogue, and a dialogue

assumes, in the nature of the case, different points of view.” *Wieman v. Updegraff*, 344 U.S. 183, 197 (1952) (Frankfurter, J., *concurring*).

Plainly, “When speech relates ‘to any matter of political, social, or other concern to the community,’ it addresses a matter of public concern... The linchpin of the inquiry is, thus, for both public concern and academic freedom, the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives.”... *Meriwether v. Hartop* at 508 (*citing and quoting Connick v. Myers*, 461 U.S. 138, 146 (1986); *Hardy v. Jefferson Cty Comm Coll*, 260 F.3d 671, 679 (6th Cir. 2001); and *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1190 (6th Cir. 2001)). Pesta’s research in “Global Ancestry and Cognitive Ability” clearly meets this bar. *Levin v. Harleston*, 770 F.Supp. 895, 921 (S.D.N.Y. 1991), *reversed on other grounds by Levin v. Harleston*, 966 F.2d 85 (2nd Cir. 1992).

Defendants have no countervailing interests worthy of consideration. Their own Misconduct Policy indicates that Pesta’s primary responsibility would take precedence over the obscure technicalities they have stood on. *Defendant Exhibit 31 at §1(A)*. And that Pesta’s speech was controversial is simply additional grounds for protection by a university. *e.g. McLennan Dep, pp. 143-144* (*noting that raising the question of whether evidence exists for a genetic link for the IQ differences between blacks and whites opens oneself to the charge of racism, which puts the man raising such questions “in a difficult situation”; indeed, to “raise that question is to wade into taboo territory.”; see also, Final Report, p.4 and Ward Dep, pp. 118-119 and McLennan Dep, p. 54 and Bloomberg Dep, p. 323*). American University’s are supposed to be “beacons of intellectual diversity and academic freedom” whose pride is that they are “forums where controversial ideas are discussed and debated.” *Meriwether v. Hartop* at 498.

That did not occur here. Instead, activists and censors from outside the university arrived with the obvious intent to interdict a disfavored viewpoint, only to be met with unscrupulous individuals within the university who were bent on the same kind of odious censorship.

In any event, for people allegedly concerned with following proper procedure, Defendants manifest a startling contempt for rules when it comes to their own actions, a contempt which imposes the obligation on this court to “meticulously scrutinize irregularities” in the application of the Misconduct Policy to determine whether it was abused to suppress First Amendment rights. *Meriwether v. Hartop* at 514. As in *Meriwether*, such scrutiny reveals unmistakable signs of abuse.

Under any normal circumstances, it would be highly irregular for a federal court to refuse to protect worthy speech, but it would be even more irregular to refuse to do so when such speech contains the germ of a powerful critique of policies adopted by the courts themselves, for protecting the thought we hate (*United States v. Schwimmer*) should begin with the courts themselves. Such is the scenario presented by Pesta’s “Global Ancestry and Cognitive Ability” (*Defendant’s Exhibit 3*) and the absurd intellectual witch hunt at Cleveland State. Thus, the first element under *Kubala v. Smith* is met: Pesta clearly engaged in protected speech or conduct.

The second element is also clearly met. Pesta was stripped of tenure and fired, a drastic result that Defendant McLennan knew could occur if the Investigative Committee’s findings were bad enough. *McLennan Dep, p. 126*. There is no question that stripping Pesta of tenure and firing him would deter a person of ordinary firmness from continuing to engage in intelligence research: “It is elemental that terminations are adverse employment actions. *Dye v. Office of the Racing Comm’n*, 702 F.3d 286, 303 (6th Cir. 2013), citing *See v. City of Elyria*, 502 F.3d 484, 494 (6th Cir.2007).

Finally, the third element under *Kubala v. Smith* is clearly met. Dr. Pesta is required to produce evidence of a causal connection between the first element—his speech, and the second—his termination. *Dye*, 702 F.3d at 294–95. This Sixth Circuit has described the necessary showing as “enough evidence of a retaliatory motive such that a reasonable juror could conclude that the [adverse employment action] would not have occurred but for his engagement in protected activity.” *Id.* at 305 (citing *Eckerman v. Tenn. Dep’t of Safety*, 636 F.3d 2020, 209 (6th Cir. 2010)). Importantly, Dr. Pesta does not need to conclusively prove that retaliation for his speech was the *sole* reason for his termination, but merely that “the adverse action was motivated at least in part by his protected conduct.” *Dye*, 702 F.3d at 294. A plaintiff can make this showing through “[c]ircumstantial evidence, like the timing of events or the disparate treatment of similarly situated individuals” as well as “through incidents of [employer] misconduct that do not rise to the level of an adverse employment action [but] ‘may be relevant at trial to show a pattern of mistreatment on the job based on plaintiff’s protected activities.’” *Thaddeus-X v. Blatter*, 175 F.3d 378, 399–400 (6th Cir.1999); *Dye*, 702 F.3d at 305.

The record thus far is replete with evidence to support a verdict that Dr. Pesta’s termination was motivated at least in part by his speech. First, CSU (nor NIH) for that matter seemed to have no issues with Pesta’s requests before Bird, et al.’s admittedly politically motivated complaints. Jurors can easily infer that these complaints, directed primarily at the content of Dr. Pesta’s speech, spurred CSU, which might otherwise have been indifferent to Dr. Pesta’s research to scramble to silence an academic that might bring the controversy of the intelligence and genetics studies to its doorstep.

Further, while CSU as an institution was the responsible party for purposes of the DUC, and the DUC was reviewed and approved by multiple CSU employees, Pesta was the only one

investigated or disciplined. *Ward Dep*, p. 253, 256, 261-262, 270, 277, 285, 287 and *Defendants Ex 12*). The only reasonable conclusion to be drawn is that the Defendants were less concerned about DUC technicalities than sending a message that Pesta's scientific conclusions were not welcome. Similarly CSU's failure to follow its own procedures in the investigation, outlined above, and the Committee's non-responses to Pesta's explanations are evidence of disparate treatment and can support a jury finding that—like Commissar Beria—CSU had found its man; it just needed to find a crime. Indeed, no other remotely plausible interpretation exists in light the email exchange on November 11, 2021 (*Mallet 1*), the draft memo at *Mallett 2*, the tell-tale language at *Final Report pp. 4—5*, and the at least fourteen procedural and substantive deviations from CSU's own Misconduct Policy, deviations that were all to Pesta's extreme prejudice.

These facts, taken along with Dr. Warne's report and declaration testimony regarding the controversy that attends inquiries into genetics and intelligence lead to one conclusion only: that Dr. Pesta's termination arose not because of technicalities, but because Defendants found his field of study and his paper—that is, his speech, problematic.

CONCLUSION

For the above reasons, Plaintiff Dr. Pesta respectfully submits that he is entitled to summary judgment on liability as to Defendants Bloomberg, Ward, Mallet, McLennan, and Regoeczi as to the Second Cause of Action regarding his termination from CSU.

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Respectfully submitted,

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